United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

V.

LAWRENCE WOLFORD

NO. 24110

BRIEF ON APPEAL

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I N D E X

ISSUES PRESENTED

I WAS THERE SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF THE DEFENDANT-APPELLANT LAWRENCE WOLFORD FOR THE VARIOUS OFFENSES OF THE INDICTMENT?

II DID THE TRIAL COURT ERR IN GIVING THE SO-CALLED "ALLEN" CHARGE?

III DID THE TRIAL COURT ERR IN NOT DECLARING A MISTRIAL AT THE CLOSE OF THE CASE BECAUSE OF THE CONFUSION OF THE JURY IN RENDERING A VERDICT?

* APPELLANT WOLFORD ADOPTS AND INCORPORATES IN HIS BRIEF ALL OF THE POINTS AND ISSUES RAISED BY APPELLANT THOMAS FLURRY IN HIS BRIEF ON APPEAL.

STATEMENT OF THE CASE

The defendant, Lawrence Wolford, was arrested on June 5,1969 and was charged with the offenses of Kidnapping, Armed Robbery, Robbery, and Assault with a Dangerous Weapon in violation of the District of Columbia Code. On October 24, 1969, a Federal Grand Jury returned an indictment charging him with those offenses. He was arraigned and entered a plea of not guilty. On December 11, 12th and 15th of December of 1969, he was tried, along with his co-defendant Thomas Flurry in the U. S. District Court for the District of Columbia before the Honorable Oliver Gasch and was found guilty of the offenses of Kidnapping, Armed Robbery and Assault With a Dangerous Weapon. He was sentenced on March 5th, 1970 to a term of ten years to life on count one, Kidnapping; ten years to life on count two, Armed Robbery, and three to ten years on count four, charging him with Assault With a Dangerous Weapon, all sentences to run concurrent with each other. On March 5, 1970 he was granted leave to proceed in forma pauperis by the trial court. Counsel was appointed to represent him on appeal by the U. S. Court of Appeals for the District of Columbia Circuit.

* This case has not been before the Court by this or any other title.

References to Rulings - None

STATEMENT OF FACTS

The case involves a hijacking of a truck owned by International Distributors Inc., a corporation licensed to do business in the District of Columbia, that contained a quantity of whiskey valued at $13,110.00. On June 5, 1969, the truck left the warehouse and was operated by the two complainants, Mr. Rufus Wilson and Mr. Robert Clark. After they had stopped for lunch and returned to the truck, they were robbed at gunpoint by four men. Mr. Wilson and Mr. Clark were taken to Rock Creek Park in a brown Mustang auto. One of the men who robbed Mr. Wilson and who took him to Rock Creek Park was identified as the co-defendant Thomas Flurry. The truck was driven to a Wig Shop located on Georgia Avenue, N. W., owned by a government witness. Mr. Sa-An Kuloyinje, where it was unloaded. The police department was given a description of the truck and tag number by Mr. Wilson, who had secured his release from Rock Creek Park. Detective William Burwell noticed this truck coming out of an alley, which leads to the rear of the Wig Shop, and followed it. The truck ultimately stopped and the driver, who was identified as the defendant Wolford, fled from the drivers seat. He was apprehended by the police and charged with co-defendants, Lindsay and Flurry with these offenses.

The first witness for the government was Mr. Kenneth B. Arthur, the warehouse manager for International Distributors (TR-103-112). He told the Court and Jury that he made an inventory of the stolen merchandise and its value was placed at a sum in excess of $13,000.

Mr. Rufus Wilson, a helper on the hi-jacked truck was the next witness for the government (TR-113-131). He told the Court and Jury as to how the Kidnapping and Hijacking took place. He identified the defendant Flurry as a participant in the offense but could not identify the appellant Lawrence Wolford.

Mr. Sa-An Kubeyinje was the next witness for the government (TR-131-155). He told the Court and Jury that he owned a Wig Shop on Georgia Avenue and knew the three defendants, Lindsay, Wolford, and Flurry. He stated that on June 5, 1969, he came to his shop and saw two police detectives who showed him the 300 cases of whiskey which had been stored in his basement. He was arrested and charged with receiving stolen property. He added that on June 5, 1969, before he was arrested he saw the defendant Flurry by the barber shop near his store and over the objection of the defense (TR-136) he stated that Mr. Flurry gave him a registration card for the car, described as a 1969 Buick, and stated that the witness was to give it to John Lindsay at the police station. Mr. Flurry told the witness that he could not go to the police station to give it to Mr. Lindsay because he was afraid of being identified "(TR-138)".

Mr. Kubeyinje stated that all criminal charges were subsequently dropped by the government. The next morning the witness, Mr. Wolford and Mr. Lindsay, in the absence of Mr. Flurry met in the cell block wherein the witness stated that Mr. Wolford assured him that he should not worry because he would not be identified. Mr. Wolford added that the younger driver is in the same gang with them. (TR-141).

On cross-examination, he noted that Mr. Wolford was merely an acquaintance and that he did not see him deliver the whiskey to the store, nor did he know of his association with the crime until the night all of them met at the cell block.

Detective William Burwell was the next government witness (TR-155-P30-Vol. II). He told the Court and Jury as to how, on June 5, 1969, he trailed the hijacked truck from the alley on Georgia Avenue and Princeton Place to a location in the northeast section in Washington. He identified Mr. Wolford as the one who drove the truck from Georgia Avenue, N. W. to its ultimate destination. He also saw the Buick Electra, 1969, in the alley, that contained Messrs. Flurry and Lindsay. The driver of the Buick, John Lindsay, was signaled by the driver of the truck, Wolford, to follow him. When the truck stopped at a location identified as the 700 block of Quincy Street, N. E., the appellant Wolford ran from the truck and was arrested by Detective Burwell.

On cross-examination Detective Burwell added that he did not see the hijacking, nor did he see the unloading of the whiskey at the Wig Store by any of the defendants.

There was a stipulation announced to the Court and Jury; to wit, that

1.) Mr. Flurry was the owner of the vehicle with tag number 727-488.

Detective Frederick Cain was the next witness for the government (TR-31-41). He told the Court and Jury that while he was in a Police Cruiser he heard broadcast a lookout for the Buick

Electra driven by John Lindsay. He saw the car at New Hampshire Avenue, N. W., and Georgia Avenue, N.W., and arrested Mr.Lindsay for this robbery.

Two guns and a towel was recovered by the police officers from the auto and they were admitted into evidence over the objection of the defense (TR-38). Prior to the close of the government's case, the prosecutor moved into evidence various exhibits including photographs, a certificate of no license to carry a pistol, guns and a motor vehicle registration (TR-47-48).

At the close of the governments case the Court denied a motion for an acquittal, except for count one of the charging the defendants with Kidnapping of Mr. Clark (TR-65).

The defense, on behalf of Mr. Wolford, did not put on any case and chose to rest. At the close of the entire case the Court again denied a motion on behalf of Mr. Wolford for a judgment of acquittal on the remaining counts.

At the close of the proceedings, the defendant Wolford was found guilty on the charges of Assault with a Dangerous Weapon, Armed Robbery, Kidnapping, and was sentenced to jail by the Hon. Oliver Gasch in the U. S. District Court. He was granted leave by the trial Court to Appeal in forma pauperis.

POINT I

THE TRIAL COURT ERRED IN GIVING THE SO-CALLED "ALLEN" CHARGE.

The appellant Wolford contends that the trial Court erred in giving the "Allen" or dynamite charge as part of its basic charge (Allen v. U.S. (164 U.S.492 (1896). This charge was given part of the basic charge (TR-264) although neither side requested it prior to the giving of the jury instructions (TR-144-159). In addition, there was never a showing that the jury was deadlocked on any of the matters that were before them, so as to bring about a need for the "Allen" charge.

The appellant Wolford contends that this charge was so coercive particularily in the form given as to deprive him of the due process of law within the meaning of the 5th Amendment to the Constitution, and constitutes plain error within the meaning of rule 52 (b) of the Federal Rules of Criminal Procedure. CF. U.S. v. Clarence Johnson, U.S.C.A., D.C._____decided June 19, 1970, _____ Fed. _____1970; it should be noted at the outset that appellant does not question the constitutionality of this jury instruction. CF. Fulwood v. U. S., 369 Fed. 960, 125 U.S. APP. D.C.183 ____, 1966). Appellant contends that in the absence of a request by either side to the case for the giving of the charge and in the absence of a finding by the trial Court that the Jury is deadlocked, the instruction is improper. In the Clarence Johnson case, supra, (slip opinion page 8-9), the Court held that the "Allen" Charge as given was improper and alluded to the charge proposed by the American Bar

Association Committee on the minimum standards of Justice 5.4, approved and adopted in the case of U.S. v. Brown, 411 Fed. 930, (1969) CF.

Instruction 3.11, Jury Instructions and forms in Federal Criminal Cases, 27 FRD 39, 1969. The new instruction eliminates all reference to the so-called duty of the minority to the majority to accept their views. The instruction given in this case had the effect of coercing the jury into bringing in any verdict without having the opportunity to evaluate the evidence and deliberate this complex case with the care it needed. This is evident with a reading of the transcript portion dealing with the taking of the verdict (TR-287-295) by the Jury. The appellant contends that the Jury was coerced unreasonably into rendering a verdict by the trial Court and thus the defendant was deprived by the conduct of the trial Court of a semblence of a fair trial. Wherefore, on this point alone appellant Wolford contends that the conviction should be reversed.

POINT II

THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AT THE CLOSE OF THE CASE DUE TO THE CONFUSION OF THE JURY IN RENDERING A VERDICT.

It is the contention of the appellant, Wolford, that the trial Court erred in not granting the motion of appellants Wolford and Flurry to have a mistrial declared after the jury's hapless efforts to render a verdict. This case was a complex matter that involved many different offenses and multiple defendants, to wit Flurry and Woldord. The trial Court, prepared and gave an exhaustive charge to the jury (TR-251-286) explaining to them the nature of the offenses and the possible verdicts that they had to return. After a period of deliberation the jury returned and told the Court (TR-287) that they made a decision on Count one, Kidnapping. The Foremen stated as follows:

> "The deputy clerk: On Count Two.
>
> The Foreman: We only made a decision on the two, sir, that was our understanding, that we had one of the five to pick from (TR-287)."

After the Court re-instructed the jury the foreman again declared:

> "The Foreman: In other words, your Honor, how many charges do we have to find? (TR-288).

Counsel at that time moved for a mistrial and that was denied. The Jury returned to its deliberation and returned within a few minutes (TR-289) (the undersigned, as trial counsel, noted that

it was three minutes.). They informed the Court that the defendants Wolford and Flurry were guilty of the remaining counts of the indictment. Counsel again moved for a mistrial but this was denied. (TR-293).

The taking of the verdict is governed by rule 31 of the Federal Rules of Criminal Procedure. Appellants contend that the trial Court abused its discretion in the taking and the recording of the verdict. A Mistrial should have been declared when it was obvious to all concerned that the jurors did not understand their functions and the nature of their obligation. After a careful and extensive charge to the jury on the law the foreman informed the Court unequivocally that the jurors unanimously understood their choice to be the solution of one of the multi counts in the indictment. After being directed of the Court to return for further deliberation on the remaining counts of the indictment, the jury returned immediately and stated the defendants were guilty as charged. The appellant contends that the jury could not have considered the remaining counts seriously and with the careful deliberation needed. They informed the Court and the defendants that they considered the evidence and the law on such matters as Armed Robbery, Robbery, Assault With a Dangerous Weapon, Aiding, and Abetting, Possession of recently Stolen Property etc., in a few moments.

The appellants contend that the conduct of the Jury was and in Violation of the rights of the defendants guaranteed by the 6th Amendment to the Constitution pertain to a fair trial by an unbiased

Jury. A Jury that is confused, and that does not follow the elementary instructions of the trial Court as to the nature of their duty cannot be said to be impartial and unbiased, and concerned with their duty of administering justice. The defendants were deprived of a fair trial by the conduct of the Jury and for that reason the conviction must be reversed. (F. U.S. v. Maurice F. Irving, #23,096, U.S.C.A., (D.C. Circ. decided Oct. 9, 1970).

POINT III

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF THE APPELLANT WOLFORD ON THE SEVERAL COUNTS OF THE INDICTMENT, TO WIT, ARMED ROBBERY, ASSAULT WITH A DANGEROUS WEAPON AND KIDNAPPING.

It is the contention of the appellant that the trial Court erred in submitting the case against the defendant Wolford to the jury on the several charges of the indictment. Even looking at the evidence most favorable to the government, light of the standards of Crawford v. U.S. 126 U.S. APP. D.C. 156,375 Fed.332 (1967) and Curley v. U.S. (81 U.S. APP. D. C. 389, 160 Fed. 229, cert. denied 331 U.S. 837, 1947), the appellant contends that the government failed to meet its burden of proof. The facts of the case indicate that Mr. Wolford was never identified as a participant of the robbery-hi-jacking. He was first identified by Detective Burwell as the driver of the stolen truck after it was seen leaving the Wig Shop on Georgia Avenue. This identification took place after Mr. Wolford was stopped in the Northeast section of Washington, D. C., some-time after the robbery took place. His participation in this scheme, under the Curley-Crawford standards, supra, is at most as accessory after the fact (D.C. Code, title 22, section 106, or a recipient of stolen property (D. C. Code, title 22, section 2205) or a driver of stolen vehicle, (title 22, section 2204), or a conspirator, title 18, U.S.C. 371). There was no evidence to show he participated in the robbery or in the kidnapping or assaulted the driver of truck with a gun. The attention of the Court on this point is directed to the

remarks of the prosecutor on the matter of the sufficiency of the evidence. Mr. Bennett stated to the Court at the close of the Government's case:

> "I think it is a reasonable inference from the evidence in this case that the man (i.e. the man who took the truck) was Mr. Wolford (TR-52,59)."

The Court questioned the Government as to the proof of Wolfords participation in the Kidnapping and the Assault charge and the prosecutor relied on a theory of aiding and abetting (TR-53), on the theory that there was "reasonable inference" that Wolford participated in the robbery (TR-55).

The appellant Wolford contends that both the prosecutor and the Court misconstrued the ruling of this Court and the Supreme Court on the doctrine of aiding and abetting CF. Nye and Nission v. U.S., 336 U.S. 613. In John Bailey v. U. S., 416 Fed. 1110 (1969) the Court of Appeals noted that before there can be a finding of aiding and abetting there must be a finding of a culpable purpose. The Court, per circuit Judge Robinson, noted that the aider and abettor is on who encourages the perpetration of the crime, such facilitating the deed as where he is the lookout or where his conduct stimulate others to render assistance. In the case at hand, there was a lack of evidence to show his role in the robbery. He was not identified as a participant or observed at the scene of the crime. In addition a substantial period of time elapsed before he was observed by Detective Burwell. It would appear, as the prosecutor noted, that

his role in the operation of things was one that the Jury might "infer" or speculate upon.

The appellant contends that the evidence might show that the appellant Wolford's conduct violated some sections of the District of Columbia Code but not those charged in this indictment. Thus for the failure of proof that the defendant participated in this plan as an aider and abettor or as a principle, the conviction must be reversed for a new trial.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,110 and 24,200

UNITED STATES OF AMERICA,
Appellee,

v.

LAWRENCE B. WOLFORD,
Appellant, (No. 24,110)

and

UNITED STATES OF AMERICA,
Appellee,

v.

THOMAS FLURRY,
Appellant. (No. 24,200)

BRIEF OF APPELLANT THOMAS FLURRY

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES PRESENTED

1. Whether the court erred in failing to grant appellant's motion to suppress the identification testimony of witness Rufus Wilson, Jr.? (Tr. 7-Vol. I)

2. Whether the court erred in failing to grant appellant's motion for a mistrial because of the prejudice arising from confusion respecting pagination of transcripts of a radio run introduced at trial? (Tr. 4 - Vo. II)

3. Whether appellant was properly charged, as a matter of law, with violation of 22 D.C. Code 2101, and whether the evidence against him on the kidnapping count was sufficient to be put before the jury for consideration? (Tr. 62 - Vol. II)

4. Whether the court erred in refusing to declare a mistrial as a result of the jury's confusion after deliberation? (Tr. 287 - Vol. III)

This case has not been before this court under this or similar title.

References to Rulings - None

STATEMENT OF THE CASE

On June 5, 1969, sometime before 10:30 a.m., a liquor truck belonging to International Distributors, Inc. and occupied by Rufus Wilson and Robert Clark, was parked outside the "Minute Lunch" in northeast Washington, D.C. Upon leaving the restaurant, Wilson and Clark were approached by three or four men, at least one of whom was armed. Wilson and Clark were placed in a brown Ford Mustang by two of the men and taken to Rock Creek Park, and the liquor truck was driven away by the remaining man/men.

The hijacked liquor was later discovered in the basement of a wig boutique on Georgia Avenue N.W. Meanwhile, witness Wilson, one of the occupants of the liquor truck, was picked up in the park by a passerby and reported the hijacking to the police.

The same day, one witness Detective Burwell was cruising in the area of Georgia Avenue, N.W. when he saw the subject liquor truck leaving an alley. Burwell followed the truck, and observed that it was being followed by a late model Buick occupied by two men. Burwell allegedly observed the occupants of the Buick "signal" by hand-waving to the driver of the truck.

The truck pulled over to the side of the road and the driver fled. Burwell radioed in the license number of the Buick and began an on-foot pursuit of the driver of the truck, whom he shortly apprehended. Subsequently, acting on information received over the radio by Burwell, Detectives Kane and Pleger stopped the Buick, which by now had but one occupant. In the Buick were found two guns and some ammunition.

Appellant Holford was identified by Witness Burwell as being the driver of the subject liquor truck, who fled therefrom and was pursued and subsequently apprehended by Burwell. Appellant Flurry was identified by witness Wilson as one of the men who approached him outside the "Minute Lunch" on June 5, 1969 and drove him to Rock Creek Park in the Brown Mustang. Appellant was also identified by Witness Burwell as the passenger in the late model Buick cited by Burwell as following the subject liquor truck. The Buick was also found to have been registered in Appellant's name.

Appellant was indicted by a Grand Jury on counts of kidnapping, armed robbery, assault with a deadly weapon and carrying a deadly weapon. He pleaded not guilty on

all counts and was tried before a jury, the Honorable Judge Oliver Casch presiding, on December 11, 12 and 15, 1969. A verdict of guilty on one count each of (1) kidnapping, (2) armed robbery, (3) assault with a deadly weapon and (4) carrying a deadly weapon was returned by the jury. Appellant was sentenced on March 31, 1970 to a term of not less than 10 years nor more than life on counts (1) and (2), and to a term of 3 to 10 years on counts (3) and (4), said sentences to be served concurrently.

Appellant filed a notice of appeal and was authorized to proceed without prepayment of costs. On September 3, 1970, this court ordered that these two cases be consolidated for all purposes.

ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION TESTIMONY OF WITNESS RUFUS WILSON

1. The Pre-trial Hearing on the Simmons (Simmons v. United States, 390 U.S. 377 (1968)) Issue Was a Nullity and Rendered Witness Wilson's In-Court Identification Inadmissible

The trial court in this proceeding properly held a

pretrial hearing under Simmons to determine initially whether Witness Wilson's in court identification was not tainted by any irregularities in the showing of photographs to the witness after the crime. Detective Pleger testified (Tr. 40 - Vol. I) that he was uncertain whether the photos he brought into court for the Simmons hearing were actually the identical photos shown to witness Wilson soon after the robbery.

> "Q. (AUSA Bennett) Can you say whether or not you are certain these are the pictures?
> A. (Pleger) Not positively, sir." (Tr. 40 - Vol. I)

The Assistant United States Attorney also indicated for the record at the beginning of the trial that Detective Pleger did not know whether the photos brought to court were the same ones shown the witness. (Tr. 7 - Vol. I)

Appellant strongly contends that the Government's failure to ensure that the photos introduced into evidence at trial were identical to those actually shown to the witness constituted prejudicial error of such magnitude as to require the suppression of witness Wilson's in-court identification. Clearly, any determination of whether the

in-court identification was fatally tainted by irregularities (possibilities of which are enumerated hereinbelow) was impossible; and as the witness was allegedly shown photos of appellant before a lineup and before trial, any irregularities in the photographic viewing would call into question the validity of later identifications.

The obvious purpose of a Simmons hearing is to inquire whether improper employment of photographs by police has caused a witness to err in identifying a suspect or an accused. The Simmons Court noted: "Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification." (390 U.S. at 383) Under Simmons, courts have repeatedly held that when photographs of suspects are shown to witnesses the photos must be of people who bear a substantially similar resemblance to the suspect. Saville v. United States, 400 F. 2d 397 (1968). See also Jones v. United States, 402 F. 2d 639 (1968); United

States v. Trivette, 284 F. Supp. 730 (D.C.D.C. 1968).

In this case, however, the patent stain on the cloth of justice is the shroud of uncertainty surrounding the Simmons hearing - the impossibility of determining with the degree of exactitude required by the Fifth Amendment whether the photographic display before the witness was proper, suggestive or marginal. Burning questions remain unanswered. Were the other photos of men bearing a superficial resemblance to appellant? How many were negro and how many white? Did any have moustaches? How similar was their respective coloring? Did the photos have robbery squad notations, suspects' names, or other suggestive items on them? These and myriad other questions remain unanswered. The only solution to such an untenable and prejudicial situation, inasmuch as the government will never be able to produce the identical photos at retrial (if the Government and the police couldn't produce the correct photos at the first trial it is fantasy to assume they could do so at retrial), is to reverse appellant's conviction. At the very least, a new trial should be ordered at which witness

Wilson's testimony would be ruled inadmissible.

The prejudice flowing to appellant does not stop with the enumeration of the above possible irregularities, however, as other possible repercussions arising out of improper photographic displays come readily to mind. For example, if appellant was the only person remotely resembling the suspect (because of any number of variables attending the showing), seeing appellant's picture and subsequently identifying him on the suggestive basis of having seen his picture could easily have reinforced within witness Wilson a feeling, notion or hunch that appellant was indeed the man. Hence, the very likely first step in a perpetuation of a wrongful identification. Thus, having possibly been chosen initially by default, appellant was effectively stripped of any subsequent change to rebut the witness's positivism.

Appellant was, in addition, denied the opportunity of reconstructing the pictorial display without the correct photos.

> But a danger of erroneous conviction lurks also in the possible inability of the accused to reconstruct the pictorial display - and consequently any unfairness to it - to which an identifying witness has been exposed. (United States v. Hamilton, 420 F. 2d 1292, 1295 (1969))

Appellant respectfully submits that the only just and equitable solution is suppression of witness Wilson's testimony. The photographic mix-up was not caused by appellant; he had no knowledge thereof; and he should not be made to suffer the consequences of the Government's mistake. Where, as here, the factual picture is incomplete as to the circumstances surrounding the showing of photographs to the witness by the police, the case must, at the very least, be remanded for a new trial at which witness Wilson would not be allowed to testify. See Smith v. United States, 413 F. 2d 366 (1968), cert. den. 395 U.S. 925 and Wright v. United States, 404 F. 2d 1256 (1968).

B. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL WHEN IT BECAME KNOWN THAT THE GOVERNMENT HAD A RADIO RUN TRANSCRIPT WITH AN EXTRA PAGE NOT PREVIOUSLY AVAILABLE TO APPELLANT

Officer Burwell, referred to in the statement of facts hereinabove as the cruising officer who noticed the stolen truck, testified on direct examination at trial that he gave the police dispatcher the license number of the Buick following the truck. (Tr. 166 - Vol. I)

Appellant's attorney at trial, in possession of certain Jencks material including an 8 page transcript of the radio run between Detective Burwell and the dispatcher, cross-examined Burwell on the basis of his transcript. This transcript, with consecutively numbered pagination from 1-8, glaringly omitted any reference by Detective Burwell to the Buick license plate number. Trial counsel's strategy, then, was to have Burwell repeat many times his statement that he radioed in the Buick tag number, and thus implant in the jurors' minds Burwell's positiveness with respect to this point. (Tr. 174, 177 - Vol. I) Trial counsel then intended to apply the coup de grace - call the police dispatcher and prove by his testimony that the Buick tag number was never, in fact, radioed in by Burwell. Successful completion of this strategical tactic would, no doubt, have very effectively destroyed Burwell's credibility in the eyes of the jury.

At this point, however, the Assistant United States Attorney examined Burwell on re-direct with two extremely pithy questions - did he broadcast the tag number and was

he sure he did so? (Tr. 178 - Vol. I) He then asked that the Government's Exhibit No. 5, the Government's copy of the transcript with two page threes (Tr. 6 - Vol. II), be marked for identification. When defense counsel examined this Exhibit the glaring error became readily apparent. Thus, the jury had the unmistakably firm impression, solidified by defense counsel on cross-examination, that Burwell did in fact radio in the tag number of the Buick.

Appellant's counsel, as a result, was effectively denied the opportunity of making the telling point (Tr. 7 - Vol. II) that Burwell made his identification of appellant based on two events which transpired subsequently: (1) the arrest of the man driving the Buick, and (2) the securing of the knowledge that the car belonged to appellant. Under such circumstances, the court should immediately have declared a mistrial, notwithstanding his statement that "I dislike to spend a day with a case and let it go out on a situation like this." (Tr. 8 - Vol. II)

The law with respect to radio run transcripts is clear that the Government should, when challenged, be required to produce a tape or log entry of a police lookout.

c.f. Daniels v. United States, 393 U.S. 359 (1968) Implicit in such a requirement is the concomitant necessity that the tape or transcript be a true one which accurately reflects the actual conversation. Due process and a fundamental fairness surely call for the Government's tendering an accurate transcript. Failure to provide the defense with the necessary accurate transcript may easily result, as here, in leaving an indelible impression in the juror's minds - an imprimatur of credibility - that can never be erased. It should also be pointed out that the pagination of appellant's transcript was in all respects normal; that he was in no wise responsible for the mistake; and that he should again not be made to suffer the consequences of the Government's error. With respect to this issue, the only just remedy is the granting of a new trial.

C. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR A JUDGMENT OF ACQUITTAL WITH RESPECT TO THE KIDNAPPING COUNT (Tr. 61-64 - Vol. II)

Appellants' contentions respecting the unapplicability of the D. C. kidnapping statute to a robbery situation

such as presented here merit serious consideration by this court, in that affirmance on this point would put a new weapon in the prosecutor's arsenal. The spectre of a long dormant kidnapping statute being resurrected for utilization in a routine robbery case involving a certain period of detention of the victim is a haunting one indeed. Thus, this court has the opportunity to place the interpretation of 22 D.C. Code 2101 in its proper perspective and hold that this statute is a kidnapping statute, purely and simply, and not one to be used in conjunction with a robbery charge.

Section 2101 of Title 22 of the District of Columbia Code provides:

> "Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnaping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for life or for such term as the court in its discretion may determine. This section shall be held to have been violated if either the seizing, confining, inveigling, enticing, decoying, kidnaping, abducting, concealing, carrying

> away, holding, or detaining occurs in the District of Columbia. If two or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and one or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.

Appellants' position is that where a person is "detained" or "moved" in the usual course of a robbery such "detention" or "movement" is an integral part of and incidental to the act of robbery and not the commission of a separate offense of kidnapping. This provision of the D. C. Code has never been used as the basis for prosecuting the perpetrator of a crime of robbery, the similar Lindbergh federal kidnaping statute (18 U.S.C. §1201) has never been so used, and the courts of other jurisdictions as well as academic commentators roundly and unanimously denounce the use of a kidnapping statute to "pad a conviction" in a robbery case.

One of the leading cases on this subject is People v. Levy, 15 N.Y. 2d 159, 204 N.E. 2d 842 (1965); cert. den. 381 U.S. 938. In Levy, three defendants were charged with kidnapping, possession of a pistol, and robbery - the

former because the victims were driven in a car for 20 minutes during the course of the robbery. The court, in reversing on the kidnapping charges, held that the definition in the New York Penal Law, §1250, related to traditional forms of kidnapping, but literally embraced in its terms any restraint. The statute, since amended, provided that a kidnapper was one who wilfully

> Seizes, confines, inveigls, or kidnaps another, with intent to cause him, without authority of law, to be securely confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained, against his will ... (emphasis added) New York Penal Law §1250

The court in Levy held:

> It is unlikely that these restraints [in robbery and rape] sometimes accompanied by asportation, which are incidents to other crimes, were intended by the legislature in framing its broad definition of kidnapping to constitute a separate crime of kidnapping, even though kidnapping might sometimes be spelled out literally from the statutory words. * * * We now overrule People v. Florio to limit the application of the kidnapping statute to "kidnapping" in the conventional sense in which that term has now come to have acquired meaning. 15 N.Y. 2d at 164.

Just as in Levy, the similar District of Columbia statute should be construed in its "conventional" sense and not broadened to cover acts not within the contemplation of the legislators at the time of enactment.

The State of New York, recognizing the wisdom of the Levy decision, in 1967 amended the penal code (New York Revised Penal Code §135.00 et.seq.) by breaking down the kidnapping in degrees and including lesser offenses of unlawful imprisonment. (See Levine, The New York Penal Law: A Prosecutor's Evaluation, 18 Buf. L. Rev. 273 (1967)) The amendments were designed to codify Levy more precisely and to ensure that the unduly harsh and broad provisions of the former kidnapping statute would not be used in situations other than conventional kidnappings. The term "conventional" encompasses first and second degree kidnapping under §§135.20 and 135.25 of the New York Penal Code, and is distinguishable from unlawful imprisonment under §§135.05 and 135.10, which involve a "restraint" and not an "abduction."

That the courts have regarded this approach as worthy of application is amply demonstrated by the cases which have since limited the application of kidnapping

statutes to "conventional kidnappings." In People v. Lombardi, 282 N.Y.S. 2d 519, 521 (1967), for example, the court stated:

> But the direction of the criminal law has been to limit the scope of the kidnapping statute, with its very substantially more severe penal consequences, to true kidnapping situations and not to apply it to crimes which are essentially robbery, rape or assault in which some confinement or asportation occurs as a subsidiary incident.

California, another forward-looking jurisdiction, recently held that robbery-related movements are incidental to the crime of robbery and not included within the definition of kidnapping movements. People v. Daniels, 459 P. 2d 225 (1969). In so holding, the court expressly overruled past decisions (e.g. People v. Chessman, 238 P. 2d 1001 (1951)) construing the phrase "kidnaps or carries away" to mean the act of forcibly moving the victim any distance whatever, no matter how short or for what purpose. (459 P. 2d at 229) Citing People v. Levy, supra, with approval, the Supreme Court of California stated:

> [t]he brief movements which [they] compelled their victims to perform in furtherance of robbery were merely incidental to that crime and did not substantially increase the risk of harm otherwise present. (459 P. 2d at 238)

The rationale underlying Levy, Daniels and Lombardi, supra, is equally applicable here. Wilson was not taken to Rock Creek Park for ransom, and there is no evidence of record to remotely indicate that appellants intended to retain indefinite control over him. The purpose in taking Wilson to the park was very obviously to facilitate the robbery - the perpetrators needed time within which to unload the liquor truck. Thus, the movement to the park can be construed in fact and in law as being nothing more than in furtherance of and incidental to the robbery.

To unhold the conviction herein with respect to the kidnapping charge could result in a rule that every robbery could also be prosecuted as a kidnapping under the statute, as long as the slightest movement was involved. This court would surely refuse to uphold a kidnapping charge related to a robbery where the victim was forced from the well-lighted path of a downtown park to a more secluded

spot 15 feet away under a tree. Yet, a "movement" would nonetheless be involved. Going a step further, this court should not be put in the position of having to concoct a distance scale in order to determine how far a victim must be moved in a robbery situation to justify a separate charge of kidnapping. The eminently sounder approach would be that adopted by the likewise progressive jurisdictions of New York and California that where the movement is incidental to the underlying crime, be it robbery, assault, rape or whatever, no separate charge of kidnapping may be imposed.

D. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL AS A RESULT OF THE JURY'S CONFUSION AFTER DELIBERATION (Tr. 287 - Vol. III)

For his argument on this point, appellant respectfully directs this court's attention to this argument in the brief of co-appellant Wolford (No. 24,110) in this consolidated proceeding, which appellant adopts as his own. Counsel agree substantially on the arguments presented to the court on this point and desire to refrain from imposing on this court the burden of reviewing duplicative pleadings.

CONCLUSION

Appellant respectfully submits to this court that his conviction for kidnapping must be reversed for the reasons stated hereinabove, and that his conviction on the courts of armed robbery, assault with a deadly weapon and carrying a deadly weapon must also be reversed because of the inadmissibility of witness Wilson's in-court identification following an improper and illegal Simmons hearing which could not possibly be rehabilitated. At the very least, a new trial should be ordered based on either of appellant points respecting the radio run and the jurors' confusion.

Respectfully submitted,

William L. Gardner
Ralph N. Albright, Jr.
(Attorneys for Appellant
Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have delivered a typed stencil of this brief to the Clerk of the court, and that said Clerk has indicated by letter that a finished copy of the brief will be served on the United States Attorney.

William L. Gardner

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,110

UNITED STATES OF AMERICA, APPELLEE

v.

LAWRENCE B. WOLFORD, APPELLANT

No. 24,200

UNITED STATES OF AMERICA, APPELLEE

v.

THOMAS FLURRY, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JEROME WIENER,
Assistant United States Attorneys.

Cr. No. 1715-69

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court properly denied appellant Flurry's motion to suppress Rufus Wilson's in-court identification testimony?

II. Whether the mistake in compilation of the radio run transcript was grounds for a mistrial?

III. Whether the trial court properly denied appellant's motion for a judgment of acquittal on the kidnapping counts?

IV. Whether the trial court properly refused to grant a mistrial because the jury initially reported its verdict only as to the kidnapping charges?

V. Whether the evidence was sufficient to sustain each of appellant Wolford's convictions?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,110

UNITED STATES OF AMERICA, APPELLEE

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LAWRENCE B. WOLFORD, APPELLANT

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THOMAS FLURRY, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed October 24, 1969, both appellants were charged with kidnapping (22 D.C. Code § 2101), armed robbery (22 D.C. Code §§ 2901, 3202), robbery

(22 D.C. Code § 2901) and assault with a dangerous weapon (22 D.C. Code § 502). Appellant Flurry was also charged with carrying a dangerous weapon (22 D.C. Code § 3204).[1] Trial was held on December 11, 12 and 15, 1969, before the Honorable Oliver Gasch, sitting with a jury, and both appellants were found guilty of kidnapping, armed robbery, and assault with a dangerous weapon. Appellant Flurry was also found guilty of carrying a dangerous weapon. On March 5, 1970, appellant Wolford was sentenced to imprisonment for ten years to life on both the kidnapping and armed robbery counts, and three to ten years for the assault, all sentences to run concurrently. On March 31, 1970, appellant Flurry was sentenced to imprisonment for ten years to life on both the kidnapping and armed robbery counts, three to ten years for the assault, and three to ten years for carrying a dangerous weapon, all sentences to run concurrently. These appeals followed.[2]

The Offense

On June 5, 1969, Rufus Wilson, Jr., and Robert L. Clark were working on a truck delivering whiskey and wine[3] for the International Distributors Corporation (Tr. I, 16).[4] At approximately 10:30 a.m. they stopped for sandwiches at the Minute Lunch, at the corner of Montana Avenue and Bladensburg Road, N.E. (Tr. I, 114). As they left the restaurant, appellant Flurry and two other men surrounded them (Tr. I, 113-114). Flurry went behind Wilson and put something which felt like a

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[1] A third defendant, John U. Lindsay, who was also charged with all of the offenses, later pleaded guilty to armed robbery.

[2] The two appeals were consolidated by order of this Court on September 30, 1970.

[3] The truck contained over $13,000 worth of whiskey and wine (Tr. I, 10).

[4] "Tr. I" includes the proceedings of December 11, 1969; "Tr. II" includes the proceedings of December 12, 1969; "Tr. III" includes the proceedings of December 15, 1969.

gun in his back, and Wilson and Clark were told that they would be taken "for a little ride" (Tr. I, 17-18, 113-114). The keys to the delivery truck were seized, and Wilson and Clark were forced into a brown Mustang (Tr. I, 17). Appellant Flurry drove the Mustang; one of the other abductors sat with a gun in his lap in the front passenger seat, and Wilson and Clark sat in the back of the car (Tr. I, 22, 28, 116).[5] Flurry drove the car to Rock Creek Park, where, after approximately forty-five minutes to one hour of imprisonment, Wilson and Clark were released (Tr. I, 17-22, 115-116). As the two captives departed, Wilson observed a Buick entering the park, headed in the direction where he had last seen the Mustang, and in a few minutes the Buick returned from that direction and left the park (Tr. I, 26, 118). Wilson went to report the hijacking to the police (Tr. I, 27, 128).

At approximately 11:00 o'clock Detective Billy E. Burwell heard the lookout broadcast from the hijacked liquor truck and spotted the truck as it exited from an alley on the west side of the 3600 block of Georgia Avenue (Tr. I, 156-157). As Detective Burwell maneuvered his car behind the truck, he noticed that a dark green 1969 Buick Electra 225 was parked near the alley (Tr. I, 157, 161-162). When the truck passed the Buick, the driver of the Buick motioned to the driver of the truck, and the Buick pulled into traffic behind the truck and Detective Burwell (Tr. I, 162). Although he did not know them by name, Burwell did recognize both the driver of the truck, appellant Wolford, and an occupant of the Buick, appellant Flurry, as men he had seen many times before in his assigned neighborhood (Tr. I, 158, 160-161).[6]

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[5] Mr. Wilson was told by the man seated next to appellant Flurry that "if I didn't shut up he bust me in my mouth" (Tr. I, 22).

[6] Detective Burwell also recognized the driver of the Buick as John Lindsay (Tr. I, 160-161), the third defendant who later pleaded guilty to armed robbery. At trial Mr. Wilson identified Lindsay as the driver of the Buick which he had seen enter and leave the park (Tr. I, 118).

The three vehicles proceeded down Princeton Place to Water Street, where they all made left turns and continued on Water Street to Rock Creek Church Road, stopping in the 500 block (Tr. I, 162). Detective Burwell transmitted the description and license number of the Buick to the police dispatcher and attempted to stop Wolford, who had gotten out of the truck (Tr. I, 163-164). When Detective Burwell identified himself as a police officer, appellant Wolford ran; and as he gave chase, Burwell saw the Buick drive away (Tr. I, 164). Appellant Wolford ran across several backyards and into a private house at 729 Quincy Street, N.W., where Detective Burwell finally apprehended him (Tr. I, 165).

Detective Frederick A. Cain and his partner, Detective Robert L. Pleger, were cruising in the vicinity of the 3200 block of Georgia Avenue, N.W., when they heard the lookout description and tags of the Buick Electra 225 (Tr. II, 31-32). Detective Cain, seeing the car fitting the lookout description, stopped at a red light, got out of his vehicle and placed the driver, John Lindsay, under arrest (Tr. II, 32).[7] Cain seized two loaded revolvers wrapped in a white turkish towel from under the front passenger seat of the Buick (Tr. II, 38-40).

Sa-An Kubeyinje was the owner of a wig shop at 3628 Georgia Avenue, N.W.[8] On June 5, 1969, Mr. Kubeyinje was requested by an acquaintance, appellant Flurry, to take the registration for Flurry's 1969 Buick to the police station and to give it to John Lindsay, who, Flurry said, had been arrested for driving without the registration (Tr. I, 138). When Mr. Kubeyinje asked why Flurry could not personally deliver the registration, Flurry replied, "I don't want to go to the station myself, because I will be identified" (Tr. I, 138).

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[7] Appellant Flurry was not in the car.

[8] The alley from which Detective Cain originally observed the hijacked truck exit leads to the back of Mr. Kubeyinje's shop (Tr. I, 161).

Mr. Kubeyinje did not honor Flurry's request but rather returned to his wig shop, where he later discovered that the hijacked liquor had been deposited in his basement. He was thereafter placed under arrest for receiving stolen property.[9] On the morning of June 6, while having coffee in the jail facility, Mr. Kubeyinje conversed with another acquaintance, appellant Wolford, who told Kubeyinje not to worry because he was not present when the liquor was placed in his basement (Tr. I, 141).[10]

On June 9, 1969, Rufus Wilson identified a picture of appellant Flurry from a group of seven photographs as the man who had driven the Mustang (Tr. I, 39), and subsequently Flurry was placed under arrest by Detective Cain (Tr. I, 48).

The Pre-Trial Hearing

At the pre-trial identification hearing Rufus Wilson testified to the events of June 5, 1969. He remembered identifying appellant Flurry from several photographs and at a lineup (Tr. I, 18-20). Prior to either identification the police never indicated that anyone was a suspect (Tr. I, 18-20). Mr. Wilson further testified that on June 5 he saw appellant Flurry's features clearly during the forty-five minutes to one hour he was in captivity (Tr. I, 20-21), and he was positive in his in-court identification of appellant Flurry (Tr. I, 18).

Detective Pleger testified that on June 9, 1969, he showed Mr. Wilson seven black and white photographs and that Mr. Wilson positively identified a picture of appellant Flurry from this group (Tr. I, 39). He identified seven photographs which, to the best of his knowledge, were the photographs shown to Mr. Wilson.[11] Detective

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[9] The charges against Mr. Kubeyinje were subsequently dropped.

[10] Appellant Wolford also told Mr. Kubeyinje that no identification would be made because the younger driver (Robert Clark) was "in the same gang" and if the older driver (Rufus Wilson) identified anyone they "would get rid of him" (Tr. I, 141).

[11] Detective Pleger had preserved the photographs shown to Mr. Wilson along with photographs used in other hijacking cases. He

Pleger also was present at the lineup and observed Mr. Wilson positively identify Flurry (Tr. I, 41-42).[12]

At the close of all the testimony, the court ruled that it would allow an in-court identification of Flurry by Mr. Wilson (Tr. I, 89).

The Trial

At trial Mr. Kenneth Arthur, a representative of International Distributors Corporation, testified that on June 5, 1969, one of the company trucks carrying over $13,000 in whiskey and wine was hijacked (Tr. I, 108-110). Rufus Wilson repeated his earlier testimony concerning the hijacking and made an in-court identification of appellant Flurry (Tr. I, 115). Sa-An Kubeyinje recounted his involvement in the hijacking and the conversations he had with both appellants, and made in-court identifications of both appellants (Tr. I, 135, 142).

Detectives Burwell and Cain testified concerning their participation in the case. After cross-examination of Detective Burwell, counsel for appellant Flurry[13] discovered that the transcripts of the dispatcher's report furnished to both appellants did not contain the page in which Burwell reported the license number and description of the Buick (Tr. I, 178-180). In accordance with a suggestion by Flurry's counsel,[14] the court prohibited Burwell from testifying further concerning his report to the dispatcher (Tr. I, 182-183). After a stipulation that appellant Flurry was the owner of the Buick stopped by Detectives Cain and Pleger (Tr. II, 30), the Government rested (Tr. II, 47).

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therefore was not positive that the photographs submitted to the court were the same ones that were shown to Mr. Wilson (Tr. I, 40).

[12] Mr. Kubeyinje also recounted the events of June 5 at the pretrial hearing (Tr. I, 55-80).

[13] Flurry is represented by different counsel on appeal.

[14] Counsel later changed his mind and requested a mistrial, but the court decided to proceed with the case (Tr. II, 5-8).

Neither appellant testified. The defense consisted of examination of Detective Pleger (Tr. II, 85-91); Officer James J. Raybill, the officer who interviewed Mr. Wilson on June 5, 1969 (Tr. II, 92-96); Mr. Kubeyinje (Tr. II, 108-119); and Officer Walter R. Capps and Mr. James F. Nenno, two experts who tested various items for fingerprints and did not match any prints found with those of either appellant (Tr. II, 126-140).

After instruction by the court, the jury retired to deliberate and returned with verdicts of guilty on the charge of kidnapping as to both appellants (Tr. III, 287). When asked about the charge of armed robbery, the foreman replied:

> We only made a decision on the two, sir. That was our understanding, that we had one of the five to pick from (Tr. III, 287).

The court reinstructed on this matter,[15] and the jury later returned verdicts of guilty on all counts as to both appellants (Tr. III, 290-291).

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[15] The following colloquy occurred between the court and the jury foreman:

> THE COURT: . . . [T]he Court wishes you to reach a verdict as to the first count which you have already done, and the second count is armed robbery, you need not consider Count Three which charges robbery, but if you find the defendant not guilty of Count Two which charges armed robbery, then you go on to consider Count Three which charges plain robbery, and then having considered the robbery count or counts, you should go on to Count Four which charges the offense of assault with a dangerous weapon, then Count Five, which charges the defendant Flurry alone with Count Five, carrying a dangerous weapon.
>
> THE FOREMAN: In other words, Your Honor, how many charges do we have to find?
>
> THE COURT: Each count of the indictment you should consider. The only exception to that, sir, is you need not consider Count Three if you find the defendant guilty of Count Two. That is the only thing you don't consider (Tr. III, 288).

ARGUMENT

I. The trial court properly denied appellant Flurry's motion to suppress Rufus Wilson's in-court identification testimony.

(Tr. I, 86, 182, 288; Tr. II, 8)

Appellant Flurry contends that Rufus Wilson's in-court identification was inadmissible because Detective Pleger was not positive that the pictures he identified at the pre-trial hearing were the exact same photographs initially shown to witness Wilson. In so arguing appellant assumes that the photographs submitted before trial were not identical to those shown to Mr. Wilson on June 9. Apart from Detective Pleger's candid observation, there was no testimony indicating that the photographs were not the same. There was, however, testimony by Rufus Wilson on direct examination suggesting the contrary:

> Q. Look at Exhibits 1 through 7. Do these *look like* the photographs they showed you?
> A. Yes.
> Q. Do you see the man whose picture you picked out?
> A. That is him. (Tr. I, 86) (emphasis added).

Although appellant Flurry claims that "the patent stain on the cloth of justice is the shroud of uncertainty surrounding the *Simmons* hearing" (Appellant Flurry's Br. at 7), at no time did he attempt to eradicate the stain. It was incumbent upon appellant as the moving party to establish that the "photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). Although appellant now states on appeal that "[b]urning questions remain unanswered" (Appellant Flurry's Br. at 7), he at no time asked these questions or sought answers to them at the pre-trial hearing. Since appellant Flurry did not there pursue the question of sug-

gestivity, he has failed to meet his burden and cannot now complain.

Assuming *arguendo* that the photographs were not properly preserved and assuming further that they were unduly suggestive, appellant Flurry is still incorrect in his assertion that the in-court identification was improper. By denying the pre-trial motion the trial court found that Rufus Wilson's opportunity and ability to observe appellant Flurry provided an independent basis for his in-court identification. We submit that clear and convincing evidence of an independent source was abundant. Mr. Wilson testified that he was appellant Flurry's prisoner for approximately forty-five minutes to an hour, during which time he saw Flurry face to face and closely observed his features (Tr. I, 18, 20-21).

It was the court's function to determine whether there was an independent source for the in-court identification, and its finding that such an independent source existed was consistent with the evidence. *United States* v. *(Gregory) Harris*, D.C. Cir. No. 23,254, decided November 27, 1970, slip op. at 5; *cf. United States* v. *McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969. In seeking to have this finding reversed, appellant Flurry must shoulder a heavy burden. *United States* v. *(Clinton) Long*, 137 U.S. App. D.C. 275, 278, 422 F.2d 712, 715 (1970); *see (Anthony) Long* v. *United States*, 137 U.S. App. D.C. 311, 424 F.2d 799 (1969); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) *(en banc)*, *cert. denied*, 394 U.S. 964 (1969). He has not succeeded in fulfilling this responsibility.

II. The mistake in compilation of the radio run transcript was not grounds for a mistrial.

(Tr. I, 183)

In the two radio run transcripts provided to appellants at trial, the page on which Detective Burwell reported the Buick's tag numbers was missing. Appellants claim that their reliance on these transcripts caused prejudice

requiring a mistrial. Since the mistake was an oversight which upon discovery was immediately remedied, and since appellants could not reasonably have believed that Detective Burwell had not called in the license number of the Buick, we submit that appellants' claim is without merit.

As stated by the prosecutor at trial, both appellants through informal discovery were well aware that Detectives Pleger and Cain were provided the tag numbers and description of the Buick and thereafter stopped the car (Tr. I, 183). The detectives would have had no reason to stop the Buick if they had not received from Detective Burwell the license number and description of the car involved in the hijacking. The only possible manner in which the detectives could have been informed was through the police radio dispatcher. In our view, appellants' alleged reliance on the mistake in compilation was far from reasonable and, as stated by the court, mere reliance on "what looked like a windfall" (Tr. II, 8).[16]

In addition, when the court discussed this matter with counsel, Flurry's trial counsel [17] suggested:

> I believe the best that can happen now is that it be left out without any further redirect on this issue or any further cross-examination on this issue. (Tr. I, 182.)

Although counsel later concluded that the error would require a mistrial, the court ruled in favor of his initial suggestion, and the case continued (Tr. II, 8). We maintain that this ruling was proper and that any possible prejudice to appellants was certainly far less than that required for a mistrial.

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[16] We also note that even a casual reading of the radio dispatcher's transcript without the necessary page clearly indicates that a page is missing.

[17] See footnote 13, *supra*.

III. The trial court properly denied appellants' motion for judgment of acquittal on the kidnapping counts.

Appellants contend that where a kidnapping offense is merely incidental to another offense, the kidnapping is not indictable, but they fail to cite any authority in this jurisdiction to support their contention. We submit that appellants are mistaken as to the law in this jurisdiction,[18] and that even under their interpretation of the law in California and New York, the instant kidnapping convictions must be affirmed.[19]

People v. *Daniels*, —— Cal. 2d ——, 459 P.2d 225, 80 Cal. Rptr. 897 (1969) *(in bank)*, concerned four separate rape offenses, each involving no greater asportation of the victim than the confines of the victim's home (or in one case the victim's car) would permit. The applicable provision of the California Penal Code, section 209, contained the phrase "kidnaps or carries away," and in construing that phrase the California court overruled

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[18] Appellants' statements that an affirmance as to the kidnapping charges would "put a new weapon in the prosecutor's arsenal" (Appellant Flurry's Br. at 13) and that 18 U.S.C. § 1201 has never been used to prosecute the perpetrator of a robbery (Appellant Flurry's Br. at 14) indicate unawareness of the case of *McCollough* v. *United States*, D.C. Cir. No. 22,144, decided May 25, 1970 (unpublished), in which the victim was transported from Maryland to his place of business in the District of Columbia, where the defendants robbed his safe. The victim was under the defendants' control for slightly more than two and one-half hours. Although clearly the asportation in that case was directed solely toward the success of the robbery, this Court affirmed convictions of robbery, assault with a dangerous weapon, housebreaking *and* kidnapping.

[19] In addition we note that the statutes involved, CALIF. PENAL CODE §§ 207-210 (West 1970) and N.Y. PENAL LAW § 135.00, subds. 1. and 2, and § 135.20 (McKinney 1967) are significantly different from 22 D.C. Code § 2101, particularly insofar as both California and New York have enacted kidnapping statutes which establish gradations or degrees of kidnapping and, correspondingly, punishment. In the "Practice Commentary" to section 135.20, which defines kidnapping in the second degree, an example given of an offense under this section is "confinement of a guard or watchman by violence or threat for a few hours for the purpose of advancing a burglary." N.Y. PENAL LAW § 135.20, *supra*, at 316.

prior decisions[20] and held that the legislature meant to exclude from the reach of the statute "not only 'stand-still' robberies . . . but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." —— Cal. 2d at ——, 459 P.2d at 238, 80 Cal. Rptr. at 910. Accordingly, that court reversed the kidnapping convictions in which the asportation was described as "the brief movements which they compelled their victims to perform . . . solely to facilitate [the crimes of rape and robbery]." *Id.* at ——, 459 P.2d at 232, 80 Cal. Rptr. at 904.

Although the very slight asportation which occurred in *Daniels* is sufficient to distinguish that case, the New York opinions relied upon in *Daniels* further reveal that the *Daniels* reasoning would not support acquittal in the present case.[21] In *People* v. *Levy*, 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793, *cert. denied*, 381 U.S. 938 (1965), the defendants entered the victim's car in Manhattan and drove them around for twenty minutes while effecting a robbery, then left the car. In reversing the kidnapping convictions and dismissing those counts

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[20] *People* v. *Chessman*, 38 Cal. 2d 166, 238 P.2d 1001 (1951), which had held that it was the fact of asportation, not the distance, which rendered the statute applicable, and *People* v. *Wein*, 50 Cal. 2d 383, 326 F.2d 457 (1958).

[21] The court in *Daniels* commented approvingly on the Model Penal Code kidnapping provision § 212.1 (Tentative Draft No. 11, 1960, which was adopted virtually verbatim in the Proposed Official Draft, May 4, 1962). As is the case with the New York and California statutes, the Model Penal Code distinguishes between simple false imprisonment and the more dangerous abductions for felonious purposes (*i.e.*, kidnapping). Kidnapping is defined as the "[unlawful removal of] another from his place of residence or business, or a substantial distance from the vicinity where he is found . . . [f]or any of the following purposes . . . (b) to facilitate commission of any felony or flight thereafter . . . ." However, if the victim is released alive, the crime is reduced to a second-degree felony. The *Daniels* court's approval of such a scheme further supports our contention that it would sustain the instant "kidnapping" convictions.

of the indictment, the *Levy* court concluded that the asportation was an integral part of other crimes of which the defendants were convicted and that the legislature did not intend that there be separate indictments for kidnapping under such circumstances. The court, however, did reflect:

> There may well be situations in which actual kidnapping in this sense can be established in conjunction with other crimes where there has been a confinement or restraint amounting to kidnapping to consummate the other crime. But the case now before us is essentially robbery and not kidnapping. 15 N.Y.2d at 165, 204 N.E.2d at 844, 256 N.Y.S.2d at 796.

As an example of a factual situation which would permit separate indictments, the court cited *People* v. *Black*, 18 App. Div. 2d 719, 236 N.Y.S.2d 240 (1962), *cert. denied*, 375 U.S. 898 (1963), in which the defendant burglarized the victim's home and then carried the victim with him when he left. The *Black* court emphasized that the kidnapping occurred after the robbery and that

> these crimes had no connection with each other except insofar as defendant might have believed that a hostage would give him some insurance against close pursuit. 18 App. Div. 2d at 721, 236 N.Y.S.2d at 243.[22]

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[22] The *Levy* court approvingly cited Note, 110 U. PA. L. REV. 293 (1961), respecting the separation of "essentially separate" crimes from "integral" acts of the same offense. *People* v. *Levy*, 15 N.Y.2d at 160, 204 N.E.2d at 846, 256 N.Y.S.2d at 797. In commenting on the effect upon one who is forcibly transported and restrained, the author of the Note stated:

> When a person is so moved, an aggressive reaction becomes more likely . . . ; movement goads, and each step which takes the victim away from the familiar, away from possible aid, aggravates his retaliatory and freedom-seeking impulses, compounding the danger that serious injury will result. 110 U. PA. L. REV. at 296.

[Footnote continued on page 14]

In *People* v. *Lombardi*, 20 N.Y.2d 266, 229 N.E.2d 206, 282 N.Y.S.2d 519 (1967), the defendant transported drugged girls to a motel with the intent to rape them. The court followed the *Levy* view and considered the detention for a relatively short period of time and the asportation as playing no significant role in the crime. 20 N.Y.2d at 270-271, 229 N.E.2d at 208-208, 282 N.Y.S. 2d at 521-522.

Thus the *Levy-Lombardi* rule envisions special factual circumstances of minor asportation for a short period of time when such asportation is executed concurrently with the perpetration of another crime. In the recent case of *People* v. *Miles*, 23 N.Y.2d 527, 245 N.E.2d 688, 297 N.Y.S.2d 913, *cert. denied*, 395 U.S. 948 (1969), the New York Court of Appeals refused to apply the *Levy* rule where the defendants attempted to kill their victim in New Jersey but, because their efforts aborted, drove into New York in an effort to dispose of the body. The court found that the defendants' purpose in driving into New York was "connected with but not directly instrumental to the attempt to kill [the victim] . . . ." 23 N.Y.2d at 529, 245 N.E.2d at 921. In distinguishing *Levy* and *Lombardi* the court stated:

> The robbery and rapes could not be committed in the forms planned without the limited asportations there involved. Indeed, in any robbery, there is a restraint of "false imprisonment" and in every rape there is a similar restraint and often removal in some limited sense. It is this kind of factual merger with the ultimate crime of the preliminary, prepara-

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[22] [Continued]

The Note then goes on to say that in determining whether the offense of kidnapping has occurred

> there should be an examination of the facts to determine whether or not the asportation created a risk distinct from that inherent in the crime which the movement accompanied; pertinent considerations should be whether the distance covered was substantial and whether the victim was isolated from the aid of others [citing MODEL PENAL CODE § 212.1, *supra*]. *Id.* at 296-297.

> tory, or concurrent action that the rule is designed to recognize and thus prevent unnatural elevation of the "true" crime to be charged. It is a merger suggestive of, but not quite like the merger of the preparation and attempt with the consummated crime, a familiar concept in the criminal law.
>
> . . . [T]he *Levy-Lombardi* rule . . . *was not designed to merge "true" kidnappings into other crimes merely because the kidnappings were used to accomplish ultimate crimes of lesser or equal or greater gravity.* Moreover, it is the rare kidnapping that is an end in itself; almost invariably there is another ultimate crime. 23 N.Y.2d at 539-540, 245 N.E.2d at 694, 695, 297 N.Y.S.2d at 922 (emphasis added).

In the instant case, after the hijacking Mr. Wilson was forced into an automobile and driven to Rock Creek Park, his captivity lasting for approximately forty-five minutes to one hour. As in the *Black* and *Miles* cases, *supra*, these crimes were sufficiently distinct to warrant separate indictments. Here the truck had been seized and the hijacked goods were in appellants' possession before the kidnapping began. Even under New York or California statutes the cases cited above would compel affirmance of the instant convictions.

IV. The trial court properly refused to grant a mistrial because the jury initially reported only its verdict as to the kidnapping charges.

(Tr. III, 261, 287-288, 294)

Appellants' claim that the misunderstanding in reporting the verdict required a mistrial is based upon the jury foreman's statement, after reporting guilty as to both appellants on the charge of kidnapping, that the jury believed it had "one of the five [counts] to pick from" (Tr. III, 287). This misunderstanding, albeit unfortunate, falls far short of grounds for a mistrial.[23]

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[23] We note that the court, without objection, instructed the jury that it should render separate verdicts with respect to each appellant as to each count (Tr. III, 261). Certainly the guilty verdicts as to kidnapping therefore cannot be challenged.

When confronted with the obvious confusion, the trial court properly reinstructed the jury and sent the jury back for further deliberation. *United States* v. *McCoy*, —— U.S. App. D.C. ——, 429 F.2d 739 (1970); *United States* v. *Brooks*, 137 U.S. App. D.C. 147, 420 F.2d 1350 (1969); *Williams* v. *United States*, 136 U.S. App. D.C. 158, 419 F.2d 740 (1969), *(en banc)*. See Rule 31(d), FED. R. CRIM. P. The length of time required for redeliberation is irrelevant. The record indicates that the jury initially deliberated for a reasonably lengthy period of time (Tr. III, 294) and that the jury foreman stated, after the court's reinstruction, that the jury would have to "make a vote" (Tr. III, 288). From the record we conclude that the jury, faced with the overwhelming evidence against appellants, certainly decided that they were guilty as to each of the counts charged and that the misunderstanding was merely in reporting the findings to the court. Upon returning to report its final verdict the jury asserted with positivity its belief in the guilt of both appellants. The court clearly did not abuse its discretion in dealing with the jury's momentary confusion.

V. The evidence was sufficient to sustain each of appellant Wolford's convictions.

(Tr. I, 141, 158, 164-165)

The Government's theory at trial was that appellant Wolford was an aider and abettor. The criteria for establishing aiding and abetting are (1) that an offense was committed by someone, (2) that appellant participated or assisted in the crime, and (3) that appellant had guilty knowledge of the crime. *United States* v. *(Thomas) Harris*, D.C. Cir. No. 22,742, decided August 12, 1970, slip op. at 25 n.40. We submit that, viewing the evidence in the light most favorable to the Government, the evidence was sufficient for the case to go to the jury for a determination of appellant Wolford's guilt. *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375

F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

In an aiding and abetting case, the Government must show that the accused associated himself with the venture and that he sought by his action to make the venture succeed. *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *(James) Long* v. *United States*, 124 U.S. App. D.C. 14, 360 F.2d 829 (1966); *see Bailey* v. *United States*, 135 U.S. App. D.C. 95, 416 F.2d 1110 (1969). The testimony concerning appellant Wolford's driving of the hijacked truck (Tr. I, 158), his flight when confronted by the police (Tr. I, 164-165), and his statements to Mr. Kubeyinje (Tr. I, 141) certainly provided a sufficient basis for a jury determination of his guilt as to each of the counts in the indictment.[24]

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[24] Appellant Wolford also urges that the trial court erred in giving an *Allen*-type instruction in its original charge to the jury on the ground that it was given "in the absence of a finding by the trial court that the jury [was] deadlocked . . . ." (Appellant Wolford's Br. at 9). *See Allen* v. *United States*, 164 U.S. 492, 501 (1896). This precise contention was rejected in *United States* v. *McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969, slip op. at 2 n.2; *accord*, *United States* v. *Simpson*, D.C. Cir. No. 23,269, decided November 17, 1970, slip op. at 2. The case of *United States* v. *Johnson*, —— U.S. App. D.C. ——, 432 F.2d 626, *cert. denied*, 400 U.S. —— (1970), is not to the contrary.

Appellant also complains of the form of the *Allen* charge. Since *United States* v. *Thomas*, D.C. Cir. No. 22,768, decided November 6, 1970, is prospective in nature, the trial court's instruction was proper. *United States* v. *Simpson*, *supra*. We would also point out that the United States is seeking rehearing of the *Thomas* case before the Court *en banc*.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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